

# **In the Supreme Court of the United States**

OCTOBER TERM, 1962

No. 293

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL  
OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA  
CIRCUIT

## **MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

As petitioner states (Pet. 4), the major issues in this case were presented by petitioner and answered by the government in No. 39, this Term (No. 520, O.T. 1961), involving petitioner's application for review of the denial of a preliminary injunction in the second round of his judicial review of an order of deportation. The only new issue raised concerns the assignment of petitioner's appeal from a subsequent order of the district court dismissing the complaint to the same division of the court which heard his first appeal when one of the members of that division had not participated in the earlier decision.

(1)

Petitioner was ordered deported in 1957 after a hearing at which evidence was introduced that he was an active, dues paying, voluntary member of the Communist Party. After the decision of this Court in *Rowoldt v. Perfetto*, 355 U.S. 115, the administrative proceedings were reopened at petitioner's request to permit petitioner to present evidence that he came within the rationale of that decision. He did not present evidence at the reopened hearing, and the administrative authorities found, on the record already before them, that the evidence showed that petitioner's membership was meaningful within the *Rowoldt* decision. The order of deportation was subsequently upheld by the district court. The court of appeals affirmed and a petition for a writ of certiorari was denied by this Court. 286 F. 2d 824 (C.A.D.C.), certiorari denied, 365 U.S. 871. The division of the Court of Appeals for the District of Columbia Circuit which passed on the case consisted of Judges Bastian, Danaher and Edgerton, but Judge Edgerton did not participate.

After the denial of the petition for a writ of certiorari, petitioner again applied to the Board of Immigration Appeals for leave to reopen the proceedings, asserting that he wished to testify that he never personally advocated the violent overthrow of the government and never knew the Communist Party so to advocate. Petitioner contended that the issue of personal advocacy was injected into the case for the first time by the opinion of the court of appeals. After the Board of Immigration Appeals refused to reopen the proceedings for a second time, petitioner again sought

judicial review. His request for a temporary restraining order and preliminary injunction against his deportation pending such review was denied. The denial was affirmed upon appeal by Judges Bastian and Danaher. Review of that order is sought by the petition in No. 39.

While that petition for a writ of certiorari was pending, the district court granted summary judgment in favor of the government and dismissed the complaint. After petitioner appealed to the court of appeals, the government made a motion to affirm, the motion coming before a division consisting of Judges Bastian, Danaher and Fahy. That division ordered that the motion to affirm be referred to the division of the court which had decided petitioner's original appeal (i.e., Judges Bastian, Danaher and Edgerton). That division affirmed the order of the district court, Judge Edgerton not participating. A petition for rehearing *en banc* was denied.

Petitioner admits that under 28 U.S.C. 46(d) two judges of a three-judge panel of a court of appeals constitute a quorum. He argues, nevertheless, that it violated the "spirit" of the statute to refer the motion to affirm to the same panel that had decided his original appeal because it must have been known that Judge Edgerton would not participate.

Petitioner's contention concerns a matter involving the internal management of the business of the court of appeals. As such, it is not a question which warrants review by this Court. In this case particularly, where petitioner's argument on the second round of judicial review is in large measure predicated on the opinion

4  
written by this panel of the court of appeals on the first round (see the petition in No. 39); it was obviously good management to send the cause to the panel which was familiar with the case.

As to the other issues raised in the petition in No. 39 and repeated but not argued by petitioner here, the government rests on its response heretofore filed.

Respectfully submitted.

ARCHIBALD COX,  
*Solicitor General.*